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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JOSE ALBERTO MARTINEZ, Defendant and Appellant.	B283901 (Los Angeles County Super. Ct. No. MA064358)

APPEAL from a judgment of the Superior Court of Los Angeles County, Shannon Knight, Judge. Affirmed as modified; remanded with instructions.

Steven Schorr, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

Jose Alberto Martinez appeals from a judgment entered after a jury convicted him of the first degree murder of Magda Bermudez (Magda).[1] Martinez contends on appeal the trial court erred in denying his motion for a judgment of acquittal pursuant to Penal Code section 1118.1[2] because there was insufficient evidence of premeditation and deliberation to support his first degree murder conviction. We agree and modify the judgment to reduce Martinez's conviction to second degree murder.

Martinez also asserts, the People concede, and we agree remand is necessary to allow the trial court to exercise its discretion under Senate Bill No. 1393 (2017-2018 Reg. Sess.), which amended sections 667 and 1385, effective January 1, 2019, whether to strike the prior serious felony conviction enhancements the trial court imposed pursuant to section 667, subdivision (a)(1). We remand for resentencing, with directions for the trial court to resentence Martinez for second degree murder and to exercise its discretion whether to impose the sentence enhancements for his prior serious felony convictions.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Information and Pretrial Proceedings*

The information charged Martinez with a single count of murder (§ 187, subd. (a)). The information alleged Martinez personally used a deadly or dangerous weapon (a knife) in the commission of the offense (§ 12022, subd. (b)(1)). The information

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[1] Because some of the family members share the same last name, we refer to them by their first names to avoid confusion.

[2] All further statutory references are to the Penal Code.

further alleged Martinez had suffered three prior convictions within the meaning of the three strikes law (§§ 667, subd. (d), 1170.12, subd. (b)), and that each of the offenses was a serious felony under section 667, subdivision (a)(1)). The information also alleged Martinez suffered two prior felony convictions for which he served prison terms within the meaning of section 667.5, subdivision (b).

Martinez pleaded not guilty and denied the special allegations. Prior to trial the trial court declared a doubt as to whether Martinez was competent to stand trial within the meaning of section 1368, and it appointed a forensic psychiatrist to conduct an evaluation. After reviewing the psychiatrist's reports, the trial court found Martinez competent to stand trial. Martinez's first trial ended in a mistrial after the jury was unable to reach a verdict. Martinez admitted the prior conviction allegations prior to his second trial.

B. *The People's Case*

1. *The killing of Magda*

On September 20, 2014 Maria Bermudez (Maria), who was in her 80's, woke up at approximately 7:00 a.m. and smelled cigarette smoke coming from her adult daughter Magda's bedroom.[3] Maria did not look in Magda's bedroom but told Magda to come out. Maria knew Magda had a man with her in her bedroom because Magda did not smoke.

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[3] Maria testified at Martinez's first trial. Pursuant to a stipulation by the parties, Maria was deemed unavailable for Martinez's second trial, and her testimony from the first trial was read to the jury.

Maria waited for Magda and the man to come out, but as of a few hours later neither had emerged, and Maria went outside the house to look inside the window of Magda's bedroom. Maria saw Magda and Martinez calmly lying in bed. Maria believed "there was something that was not right" with Martinez. She called 911 from outside the house and waited for the police to arrive. Police officers arrived between 15 and 20 minutes later.

Los Angeles County Sheriff's Deputy Teresa Steen and her partner responded to Maria's house sometime between 9:00 and 10:00 a.m.[4] Deputy Steen's partner spoke to Maria, who seemed upset. Maria told the officers she was afraid of Martinez and wanted their assistance in making Martinez and Magda leave the house.

Deputy Steen tried to open the security screen on the front door but it was locked. Maria was locked out of the house. Deputy Steen called through the screen door for between one and 10 minutes,[5] asking Magda to come out, but there was no response. Maria asked the officers to break down the door, but they refused because Magda lived there and could not be forced out. Maria estimated the officers were at her house for about 15 minutes.

After the police left, Magda opened the front door to let Maria back inside. Magda said as to the locked front door, "I swear, mama, I didn't do this." Magda did not seem scared or as

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[4] Maria testified she looked inside Magda's bedroom at "more or less" 10:00 a.m. However, Deputy Sheen testified she arrived at Maria's home about 9:00 a.m.

[5] Deputy Steen testified she called through the front door for about one minute; Maria testified Deputy Steen spent 10 minutes knocking on the front door.

though she had been crying. Maria came back inside the house, and Magda went back inside her bedroom. At the time Magda's car was parked on the street in front of the house.

Maria sat down in a chair in the hallway and looked at Magda's bedroom. She prayed and waited for Magda and Martinez to come out so she could take a shower. For the next hour, everything was quiet. However, at some point during this hour Maria heard Magda say two times, "mom, help me." Maria did not respond because Magda and Martinez "were both in bed" and "not doing anything." Maria did not hear any sounds of a struggle or things being thrown inside Magda's bedroom; neither did she hear a male voice ask for help or tell Magda to stop.

Maria explained she did not respond to Magda's calls for help for the additional reason that over the previous eight months Magda's behavior had changed, and Maria had a difficult relationship with her. Magda had lost her temper and tried to hit Maria. Maria knew "there was something wrong" and suspected Magda was using drugs. Maria had never seen Martinez and Magda fight or argue, nor had she seen Magda hit Martinez.

About a half hour after hearing Magda ask for help, Maria went outside the house again to check on Magda. Maria noticed the window to Magda's bedroom was wide open, Martinez was gone, and Magda was lying on the floor bleeding. Magda's car was gone. Maria called 911 and told the operator she thought her daughter was dead. Deputy Sheen testified she and her partner arrived "between four and five hours" after they left Maria's house following the first call.[6] Maria took them to Magda's

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[6] Neither Maria nor Deputy Steen testified as to the precise time the police officers arrived for a second time at Maria's home. According to Deputy Sheen's testimony, she would have arrived

bedroom door, which was locked. Deputy Steen knocked on the door and heard music playing, but there was no answer. Deputy Steen kicked open the door and saw Magda lying on the floor on her left side in the fetal position.

Deputy Steen found a knife near Magda's head that was sticking straight into the floor. The knife was caught in Magda's hair. Magda's room was a "mess," and it looked like a struggle had occurred. A trash can had fallen down; clothes, makeup, and bedding were strewn around the room; and a metal or plastic object, described by Deputy Sheen as possibly a crowbar, was wedged between the box spring and mattress.

2. *Martinez's conduct after the killing*

On the morning of Magda's death, Martinez called his cousin, John Hiatt, and asked to come to his home so he could "wash up." Hiatt told Martinez he was not home, but would let Martinez know when he was. When Hiatt came home around noon, he called Martinez to tell him he was home. Martinez arrived a few minutes later.

Martinez was wearing a dress shirt and slacks, which were both clean. Martinez did not look injured or walk with a limp and did not have blood on him. But Hiatt noticed scratches on Martinez's neck. The first thing Martinez said to Hiatt was, "I

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back at the house sometime after 1:15 p.m. (approximately four hours after she left the house the first time, assuming the officers were there for 15 minutes). However, John Hiatt testified Martinez called him the morning of Magda's death and arrived at Hiatt's home shortly after noon. The record does not reflect when Maria made the first or second 911 call or the time of Magda's death.

took the bitch out." Hiatt believed Martinez blurted that out because he wanted to "get it off his chest and tell somebody." Martinez told Hiatt he had sliced Magda's neck or slit her throat. Martinez said he drove Magda's car to Hiatt's house and parked around the corner. Martinez appeared "upset" and "stressed" when telling Hiatt what had happened. Martinez said he had to kill Magda because she told him she planned to kill his mother and family and this was the only way he could protect his family.

Martinez stayed at Hiatt's house for no more than an hour. During that time, Martinez made calls on his cell phone using the "star 67" function, which prevents caller identification. Martinez told Hiatt he loved him and would probably never see him again. Martinez left Hiatt's house around 1:00 p.m. and walked down the street. Hiatt later saw Martinez sitting in a car with Martinez's sister, Elsa Martinez (Elsa).

At the time of the killing, Martinez was living with Elsa. He slept in his own bedroom or in the living room. Around 3:00 that afternoon Elsa called Martinez because she was concerned Martinez had not come home the previous night. Martinez sounded worried and asked Elsa to come to Hiatt's house. He said he did not want to talk on the phone. Elsa arrived five minutes later and found Martinez waiting outside of Hiatt's house. Martinez looked "beaten up pretty bad" with red marks and scratches on his throat and face. However, Martinez was walking normally and did not have any blood stains on his clothes, which were "really clean."

Elsa asked Martinez where he had been the previous night, and he told her he had been at Magda's house. Martinez said Magda was threatening to hurt Elsa, their mother, and Elsa's adult son. Magda had told him she knew where the family lived.

Martinez said Magda was threatening to burn down the home of Martinez and Elsa's mother. Martinez told Elsa, "She's not going to bother us anymore. It's done." Martinez added, "I had to do it." He repeated it more than three times. Martinez appeared "scared" and in shock. When Elsa asked Martinez how he did it, Martinez gestured by moving his index finger across his throat, which Elsa took to mean choking, slitting her throat, or injuring her with a weapon. Martinez stated Magda was fighting with him and scratching him when he saw a knife in her room. He reiterated, "[Magda's] not going to hurt my family."

Elsa was "distraught to hear something like that" and "hurt" because she knew Martinez would go to prison. Martinez told Elsa he did not call 911 or try to get help for Magda; he just left and drove Magda's car to Hiatt's house. Elsa and Hiatt later went to the police station to tell them what Martinez said.

Elsa had only met Magda once. She described Magda as appearing to suffer from "paranoia" because Magda was hiding behind her hair, looking down, and avoiding eye contact. Elsa thought Magda looked like someone using methamphetamine. Martinez had previously told Elsa about a time when Magda came to Elsa's house, noticed Elsa's car was not in the driveway, then threw a flammable substance on Martinez's hand when he opened the door for her. Elsa later noticed a burn on Martinez's hand and asked him what happened, but Martinez was hesitant to share that Magda had inflicted the burn. Another time Elsa noticed Magda following her to work. Elsa told Martinez this, but he became "[v]ery quiet" and did not do anything about it.

C. *The Investigation*

The day of Magda's death Los Angeles County Sheriff's Sergeant Mark Marbach was directed to a bus stop and found Martinez sitting on a bench. Martinez appeared nervous and provided inconsistent answers when Sergeant Marbach asked how he had arrived at the bus stop. Martinez described alternatively that he had walked there, had been dropped off by a friend, and had taken the bus. Sergeant Marbach observed fresh, minor lacerations on Martinez's wrists, forearm area, and hands. Martinez did not request medical assistance, and Sergeant Marbach did not feel it was necessary to call for medical assistance. Sergeant Marbach detained Martinez.

The same day Los Angeles County Sheriff's forensic specialist Terri Beatty documented the scene in Magda's bedroom. She documented a black backpack found in Magda's bedroom, which had an orange mallet, 10-inch crowbar, box cutter with an extra blade, hair clip, hairbrush, wallet, identification, and miscellaneous papers. Beatty photographed a staple she found on Magda's ring finger. The staple was positioned with the two prongs sticking above her knuckles pointing outwards, in a manner that if she hit someone with her fists, the prongs would have contacted that person's skin.

Beatty then went to the sheriff's station to photograph Martinez's injuries. She photographed red marks and scratches on his upper torso, front, side, back, and legs. Beatty did not notice extensive injuries, missing skin, cuts, lacerations, long bruises, or protruding bone. Later, Beatty went to Elsa's residence and photographed a kitchen knife underneath a sofa on which Martinez often slept. Elsa testified Martinez kept the knife underneath the sofa because he was "afraid," he "was tired

of watching his back," Magda "was always coming around," and he was "terrified she was going to hurt him or his family."

D. *The Autopsy*

Los Angeles County Medical Examiner Keng-Chih Su conducted an autopsy on Magda. Dr. Su concluded Magda's death was a homicide caused by multiple sharp-force injuries, which are injuries caused by sharp weapons, including knives. Magda had 98 sharp-force injuries to her body, including 76 injuries to the front and back of her neck. One of the neck injuries went through to the tongue. Of the 76 injuries to her neck, six were fatal because they cut through major vessels. All of the neck injuries were inflicted prior to Magda's death. Magda would have died within a couple of minutes after infliction of the fatal injuries to her neck. Dr. Su could not determine the order in which any of the sharp-force injuries occurred.

Magda also had seven sharp-force, nonfatal injuries on her left chest. Those injuries were likely inflicted very close to, or after, Magda's death. Magda's body also had bruises caused by blunt force on her face, chest, elbow, thighs, buttocks, arm, and back, and cuts and bruises on her eyelids. Several sharp-force injuries to Magda's left forearm and hand were defensive wounds. A toxicology report indicated Magda had methamphetamine in her bloodstream at the time of her death, but Dr. Su could not determine the effect methamphetamine had on her.

E. *The Defense Case*

Dr. Hope Goldberg testified as an expert in neuropsychology. Dr. Goldberg interviewed Martinez and performed cognitive function testing on him. Dr. Goldberg

determined Martinez's IQ score was in the fourth percentile, just above the impaired range. Martinez's processing speed, which is "how fast the brain moves information around," was in the "low-average range," but "largely within normal limits." These results led Dr. Goldberg to conclude Martinez's brain was "operating a little bit faster than he generally has the ability to think." Additionally, Dr. Goldberg opined Martinez's impulse control was impaired, which meant he was "offline" and "did not have the capacity to override automatic responses to things" and would not be able to "override emotional reactive behaviors."

Dr. Goldberg concluded Martinez's functioning was so impaired that "if there was something very upsetting or emotionally arousing, . . . he would have nothing but to react." If Martinez were emotionally aroused and began stabbing someone, he would not be able to stop because he did not "have the capacity to step back and think and then decide what to do next."

F. *Motion for Judgment of Acquittal*

After all the evidence had been presented, Martinez moved for a judgment of acquittal pursuant to section 1118.1 as to the first degree murder conviction, arguing there was insufficient evidence of deliberation and premeditation. The prosecutor argued there was sufficient evidence for a jury to conclude Martinez had an opportunity to reflect and develop the requisite specific intent during the course of inflicting 98 stab wounds. The trial court denied the motion, reasoning that premeditation and deliberation do not require a particular length of time or an advanced plan.

G. *The Jury Instructions, Verdict, and Sentencing*

The trial court instructed the jury with CALCRIM Nos. 505 (self-defense), 520 (second degree murder), 521 (first degree murder), 522 (provocation), 570 (voluntary manslaughter: heat of passion), and 571 (voluntary manslaughter: imperfect self-defense). The jury found Martinez guilty of first degree murder. The jury also found true the allegation Martinez personally used a deadly or dangerous weapon (a knife).

The trial court sentenced Martinez to 25 years to life for first degree murder, tripled to 75 years to life under the three strikes law. (§ 667, subd. (e)(2)(A)(i).) The trial court imposed a consecutive one-year sentence for the deadly weapon enhancement (§ 12022, subd. (b)(1)), two 5-year terms for two of the prior serious felony convictions (§ 667, subd. (a)(1)), and two 1-year terms for the prior prison terms (§ 667.5, subd. (b)). The court struck the remaining allegation of a third prior serious felony conviction.[7] The trial court imposed a total aggregate sentence of 88 years to life, to run consecutive to the determinate sentence imposed in another criminal case.

Martinez timely appealed.

DISCUSSION

A. *Standard of Review*

"'"The standard applied by a trial court in ruling upon a motion for judgment of acquittal pursuant to section 1118.1 is the

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[7] At the time of sentencing the trial court did not have the discretion to strike the five-year enhancement for a prior serious felony conviction. However, as discussed below, on remand the trial court now has this discretion.

same as the standard applied by an appellate court in reviewing the sufficiency of the evidence to support a conviction, that is, 'whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged.'"" (*People v. Gomez* (2018) 6 Cal.5th 243, 307; accord, *People v. Maciel* (2013) 57 Cal.4th 482, 522.) When a defendant moves for a judgment of acquittal under section 1118.1, the "'sufficiency of the evidence is tested at the point the motion is made.'" (*Maciel*, at p. 522; *People v. Stevens* (2007) 41 Cal.4th 182, 200.)

""[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a *reasonable trier of fact* could find the defendant guilty beyond a reasonable doubt."" (*People v. Ghobrial* (2018) 5 Cal.5th 250, 277; accord, *People v. Mora and Rangel* (2018) 5 Cal.5th 442, 488 ["Although we assess whether the evidence is inherently credible and of solid value, we must also view the evidence in the light most favorable to the jury verdict and presume the existence of every fact that the jury could reasonably have deduced from that evidence."].)

""The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] "'Although it is the duty of the [trier of fact] to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the [trier of fact], not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. "'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the

circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.""""""""" (*People v. Ghobrial, supra*, 5 Cal.5th at pp. 277-278; accord, *People v. Casares* (2016) 62 Cal.4th 808, 823-824.)

B. *There Is Insufficient Evidence of Premeditation and Deliberation To Support the Verdict of First Degree Murder*

1. *Governing law*

Murder is the unlawful killing of a human being with malice aforethought (§ 187, subd. (a)). "First degree murder 'has the additional elements of willfulness, premeditation, and deliberation which trigger a heightened penalty.' [Citation.] These elements require 'more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death.' [Citation.] ""The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . ."""" (*People v. Gomez, supra*, 6 Cal.5th at p. 282; accord, *People v. Lopez* (2018) 5 Cal.5th 339, 354-355 (*Lopez*) ["'An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.'"]; *People v. Pearson* (2013) 56 Cal.4th 393, 443 [same].)

In *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 (*Anderson*), the Supreme Court identified three categories of evidence relevant to a review of the sufficiency of the evidence supporting a finding of premeditation and deliberation: "(1) facts about how and what defendant did *prior* to the actual killing

which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; [and] (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)." The court added, "Analysis of the cases will show that this court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3)." (*Id.* at p. 27.)

The Supreme Court has since clarified that "[e]vidence of each of the *Anderson* factors need not be present in order to support a finding of deliberation, but planning, or motive in conjunction either with planning or with manner of killing, must be present to support such a finding." (*People v. San Nicolas* (2004) 34 Cal.4th 614, 658; accord, *People v. Prince* (2007) 40 Cal.4th 1179, 1253 [""'When evidence of all three [*Anderson*] categories is not present, 'we require either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing.'"'"].) Further,

"""*Anderson* did not purport to establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation."""
(*People v. Mendoza* (2011) 52 Cal.4th 1056, 1069; accord, *People v. Pride* (1992) 3 Cal.4th 195, 247 [". . . *Anderson* does not require that these factors be present in some special combination or that they be accorded a particular weight"]; see *People v. Hovarter* (2008) 44 Cal.4th 983, 1019 (*Hovarter*) [""""The *Anderson* analysis . . . did not refashion the elements of first degree murder or alter the substantive law of murder in any way."""].)

The People point to the brutal infliction of 98 stab wounds during Magda's killing as evidence of premeditation and deliberation. But the brutal manner of killing cannot, standing alone, support a finding of premeditation and deliberation. (*People v. Alcala* (1984) 36 Cal.3d 604, 626 ["The fact that a slaying was unusually brutal, or involved multiple wounds, cannot alone support a determination of premeditation. Absent other evidence, a brutal manner of killing is as consistent with a sudden, random 'explosion' of violence as with calculated murder."]; *People v. Pantoja* (2004) 122 Cal.App.4th 1, 14 ["Nor does the sheer quantity of the wounds or the existence of defensive wounds on [the victim's] hands prove that the assault was not committed upon sudden provocation, as the Attorney General argues."].)

As the People point out, "the method of killing alone can sometimes support a conclusion that the evidence sufficed for a finding of premeditated, deliberate murder." (*People v. Memro* (1995) 11 Cal.4th 786, 863-864.) For example, the manner of killing may be sufficient alone to show premeditation and deliberation where "[t]he manner of the killing clearly

suggest[ed] an execution-style murder." (*People v. Hawkins* (1995) 10 Cal.4th 920, 956-957 [sufficient evidence of premeditation and deliberation where there was "minimal if not totally absent" evidence of planning and motive where victim found in a ditch in an open field with gunshot wounds in the back of his neck and head and there was evidence victim was kneeling or crouching], disapproved on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110; *People v. Bloyd* (1987) 43 Cal.3d 333, 342, 348 [evidence of "cold and calculated—execution-style killings" with gunshots to head at close range to one victim on her back and another who was kneeling].)

However, in each of the cases relied on by the People in which the manner of killing other than an execution-style killing supported a finding of premeditation and deliberation, there was also evidence of planning or motive. (See, e.g., *Hovarter, supra*, 44 Cal.4th at pp. 1019-1020 [defendant planned attack by preying on young women late at night in isolated locations on highway and had motive to prevent victim from reporting his sexual and physical abuse]; *People v. Prince, supra*, 40 Cal.4th at p. 1253 [defendant planned attack by using gloves or socks to cover his hands during the killing and had motive in the form of animus against young White women]; *People v. Elliot* (2005) 37 Cal.4th 453, 471 [defendant planned attack by waiting until other customers left, then killing victim in secluded back room and had motive to silence victim who had witnessed crimes]; *People v. San Nicolas, supra*, 34 Cal.4th at pp. 658-659 [defendant killed victim because she saw him holding a bloody knife and attempting to wash off blood from other victim he killed]; *People v. Hughes* (2002) 27 Cal.4th 287, 371 [defendant planned attack by bringing knife to victim's apartment and had motive to eliminate victim

who was a witness to his crimes]; *People v. Memro, supra*, 11 Cal.4th at pp. 863-864 [defendant killed one victim to prevent him from identifying defendant as the killer of victim's friend and killed second victim to prevent him from identifying defendant as his captor and sexual exploiter]; *People v. Pride, supra*, 3 Cal.4th at pp. 247-248 [defendant planned attack by waiting until others left the building, then forcing victim into secluded conference room, and had motive to prevent victim from reporting defendant's sexual assault of her and as retaliation for her complaints about his work].)

Martinez relies on the holding in *People v. Boatman* (2013) 221 Cal.App.4th 1253, 1268 (*Boatman*), in which the court concluded the defendant's anger toward his girlfriend did not provide sufficient evidence of a motive to prove he shot his girlfriend in the face with premeditation and deliberation. In *Boatman*, just before the shooting, the defendant's girlfriend was sitting on the bed, playfully pointing a gun at the defendant. At some point the defendant took the gun from her and fired it directly at her face. Although the defendant told the police varying versions of what happened, he admitted he knew the gun was loaded and intentionally cocked the hammer back, although "'jokingly,'" then the hammer slipped, causing him to shoot his girlfriend. (*Id*. at p. 1263.) After the shooting, the defendant told his friend to call the police, tried to resuscitate his girlfriend, carried her onto the lawn to get help, and was crying, "horrified and distraught." (*Id*. at pp. 1261, 1267.)

Because the defendant intentionally pointed a loaded gun at his girlfriend and pulled the hammer back before it fired, the court found sufficient evidence to support a finding of intent to kill. (*Boatman, supra*, 221 Cal.App.4th at p. 1263.) As to

premeditation and deliberation, the People pointed to evidence of text messages from the girlfriend to the defendant and a "loud screaming argument" from which the jury could infer defendant was in a bad mood and angry with his girlfriend. (*Id*. at pp. 1267-1268.) The court rejected the People's argument that this evidence of motive supported the jury's finding of premeditation or deliberation, concluding, "any evidence of defendant's 'bad mood' or 'anger with the victim' indicates a motive to kill based on "'unconsidered or rash impulse hastily executed,"' not the sort of "'pre-existing reflection"' and "'careful thought and weighing of considerations"' required to find premeditation and deliberation." (*Id*. at p. 1268.)

2. *The brutal manner of Magda's murder, absent sufficient evidence of planning activity or motive, does not support Martinez's conviction for first degree murder*

The People contend the jury's finding of premeditation and deliberation was supported by a combination of the manner of killing, Martinez and Magda's "tumultuous romantic relationship," and Martinez's post-killing actions. We conclude otherwise. Martinez's infliction of 98 stab wounds was not an execution-style killing in which the manner of killing demonstrated a cold, calculated judgment. (Cf. *People v. Hawkins, supra*, 10 Cal.4th at p. 956; *People v. Bloyd, supra*, 43 Cal.3d at pp. 342, 348.) Although the People emphasize it would have taken considerable time to inflict 98 stab wounds, Dr. Su testified he was unable to determine in what order the 76 fatal and nonfatal stab wounds to Magda's neck occurred. Thus, the fatal wounds could have occurred at the beginning of the

attack or after numerous nonfatal wounds. As the jury was instructed, premeditation must occur before the defendant completed the acts that caused death. (See CALCRIM No. 521; see also *People v. Gomez, supra*, 6 Cal.5th at p. 282 [defendant's premeditation and deliberation assessed "'before he or she completes the acts that caused the death'"].)

By contrast, in *Hovarter*, relied on by the People, there was evidence the asphyxiation of the victim by strangulation with a rope would have taken between five and eight minutes. (*Hovarter, supra*, 44 Cal.4th at pp. 1019-1029.) As the court reasoned, "This prolonged manner of taking a person's life, which requires an offender to apply constant force to the neck of the victim, affords ample time for the offender to consider the nature of his deadly act." (*Id.* at p. 1020.)

Therefore, additional evidence of planning activity or motive was necessary to support a conviction of first degree murder. It is undisputed the People presented no evidence of planning activity at trial. Instead, the People assert there was substantial evidence of motive in light of Martinez's relationship with Magda. This evidence included Martinez's statements to Elsa after the killing that he had to kill Magda because she threatened to harm Elsa, Elsa's son, and Martinez's mother and to burn the mother's house down. Martinez repeated, "I had to do it." He assured Elsa, "She's not going to bother us anymore. It's done." Martinez similarly told Hiatt he had to kill Magda to protect his family. In addition, Magda had followed Elsa on a prior occasion. Martinez told Elsa that Magda had thrown a flammable substance on his hand when Elsa was not home. Further, Martinez kept a knife underneath the sofa in Elsa's

home because he was "terrified [Magda] was going to hurt him or his family."

There is no question there was substantial evidence Martinez intended to kill Magda. By his own words, Martinez "had to do it" to prevent her from harming his family. But early that morning Martinez and Magda were lying calmly in her bed. At some point Magda made threats to Martinez's family and a struggle ensued. Martinez had scratches on his body and items in the room were tossed around. What we do not know is whether Martinez stabbed Magda during or after the struggle, or how long after Magda made the threats Martinez grabbed the knife and stabbed her 98 times. According to Martinez, while they were fighting he saw a knife in her room. But notably he did not bring the knife he kept under Elsa's sofa to Magda's home; the knife was still there after the killing. Therefore, it was improper speculation for the jury to conclude Martinez reflected on his decision to kill Magda following her threats, as opposed to stabbing her in a rage. (See *People v. Davis* (2013) 57 Cal.4th 353, 360 ["'[A] reasonable inference . . . "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work."'"]; *People v. Sanford* (2017) 11 Cal.App.5th 84, 92 [same].)

Thus, similar to *Boatman*, even if the jury believed Magda had threatened Martinez's family and therefore he "had to do it," this was insufficient to "support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed.'" (*Anderson, supra*, 70 Cal.2d at p. 27; accord, *Lopez, supra*, 5 Cal.5th at pp. 354-355; *Boatman, supra*, 221 Cal.App.4th at p. 1266.)

The People also assert Martinez's post-killing behavior demonstrates premeditation and deliberation, but again rely on cases in which other *Anderson* factors were present. (See *People v. Perez* (1992) 2 Cal.4th 1117, 1126-1127 [defendant planned killing by not parking his car in victim's driveway, surreptitiously entering the house, and obtaining a knife from the kitchen after the first knife broke during the stabbing, and it could be reasonably inferred defendant wanted to eliminate victim as a witness against him]; *People v. Disa* (2016) 1 Cal.App.5th 654, 667 [defendant held his girlfriend's neck in a chokehold for 15 seconds after she went limp, was jealous of her relationship with another man, and was angry at her for kicking him out of his own house and insulting him].)

We recognize Martinez's post-killing actions stand in sharp contrast to the defendant in *Boatman*, who was "horrified and distraught about what he had done," asked his friend to call for help, and attempted to resuscitate his girlfriend. (*Boatman, supra*, 221 Cal.App.4th at p. 1267.) Martinez did not call for help, and instead escaped through Magda's window, took her car, washed up, and changed into clean clothes before going to his cousin's house, where he stated, "I took the bitch out." While Martinez's post-killing actions are reprehensible, they affirm his intent to kill Magda and evade arrest after committing a crime. But they do not provide sufficient evidence of "'preexisting thought and reflection rather than unconsidered or rash impulse.'" (*Lopez, supra*, 5 Cal.5th at pp. 354-355.)

C. *Remand for Resentencing Is Necessary Pursuant to Section 667, Subdivision (a)*

Martinez contends, the People concede,[8] and we agree remand is appropriate for the trial court to exercise its discretion whether to strike the prior serious felony conviction enhancements pursuant to section 667, subdivision (a).

In 2018 the Governor signed into law Senate Bill No. 1393 (2017-2018 Reg. Sess.), which went into effect on January 1, 2019. Senate Bill No. 1393 amended section 1385 by deleting subdivision (b), which prohibited trial courts from exercising discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under [s]ection 667." (Former § 1385, subd. (b).) Senate Bill No. 1393 applies retroactively to Martinez because Martinez's sentence was not final at the time the new law became effective on January 1, 2019. (See *People v. Jones* (2019) 32 Cal.App.5th 267, 272 [Sen. Bill No. 1393 applied retroactively]; *People v. Garcia* (2018) 28 Cal.App.5th 961, 973 [same]; see *In re Estrada* (1965) 63 Cal.2d 740, 744-745 [Absent contrary legislative intent, "[i]f the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies."].)

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[8] The People conceded remand would be appropriate if Martinez's conviction had not yet become final by Senate Bill No. 1393's effective date of January 1, 2019.

DISPOSITION

The judgment is modified to reflect a conviction for second degree murder pursuant to section 1181, subdivision 6.[9] As modified, the conviction is affirmed. We remand with directions for the trial court to resentence Martinez in light of the modified conviction and to exercise its discretion whether to impose or strike the prior serious felony enhancements pursuant to section 667, subdivision (a). Following resentencing, the trial court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

ZELON, J.

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[9] Section 1181, subdivision 6, provides, "When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed."